EDITOR'S NOTE

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No. 91-1072

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF UTAH, Petitioner,

v.

CARLOS REINALDO SAMPSON, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UTAH COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Utah Court of Appeals properly conclude that Mr. Sampson's fifth amendment rights against self-incrimination were violated when police officers failed to clarify his equivocal request for counsel while undergoing custodial interrogation?

2. Is the exclusionary rule properly applied to the circumstances of the police misconduct in this case as decided by the Utah Court of Appeals?

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No. 91-1072

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF UTAH, Petitioner,

v.

CARLOS REINALDO SAMPSON, Respondent.

Respondent Carlos Reinaldo Sampson respectfully requests that this Court deny the State of Utah's Petition for Writ of Certiorari seeking review of the Utah Court of Appeals' opinion in State of Utah v. Sampson, 808 P.2d 1100 (Utah Ct. App. 1991), cert. denied, 817 P.2d 327 (Utah 1991). See Appendix for copy of opinion.

STATEMENT OF THE CASE

Carlos Reinaldo Sampson's intellectual abilities are minimal. Carlos contracted Spinal Meningitis, described as "a serious infection of the brain that can cause brain damage," at the age of seven months; he is borderline mentally retarded. See trial transcript at page 75 and sentencing transcript 2 at pages 8-9. With great difficulty and family sacrifice, he managed to graduate from high school through special education classes. Trial transcript at pages 691, 701 and 725-26. At the time of this incident, Carlos was twenty-six years old; he has no prior convictions.

For purposes of this Objection to the State of Utah's Petition for Writ of Certiorari, Mr. Sampson adopts the statement of the case as contained within the opinion of the Utah Court of Appeals as more complete and accurate than that espoused by the State of Utah. Exceptions to various factual claims or omissions made by Petitioner will be noted during argument of the respective points.

REASONS FOR DENYING THE WRIT

In its petition to this Court, the State of Utah identifies four questions for review. State's petition at (i). As indicated in the opinion of the Utah Court of Appeals, the State of Utah has waivered in its positions on these questions.

At trial, the State of Utah raised but did not dwell on the issue of custodial interrogation, opting instead to argue that Mr. Sampson did not invoke, equivocally or otherwise, his right to counsel. Sampson, 808 P.2d at 1104, 1108.

On direct appeal to the Utah Court of Appeals, the State of Utah chose to focus on the custodial interrogation issue virtually ignoring, although stopping short of conceding, the equivocal request for counsel issue. Id. at 1110.

Also on direct appeal, the State of Utah did not raise any question regarding the effect, if any, of a second set of Miranda warnings given to Mr. Sampson. Id. at 1108 n.14. After the Court of Appeals reversed the conviction of Mr. Sampson, however, the State took issue with the opinion's footnote fourteen and

presented for the first time the issue that the subsequent warnings either clarified the equivocal request for counsel or obviated any need to clarify the request. Id. at 1112.[1] The Utah Court of Appeals permitted rehearing, requesting briefing and argument on the new issue. Id.

The Court of Appeals rejected the argument, Id. at 1114, and the Utah Supreme Court denied the State of Utah's petition for certiorari filed in that court. State v. Sampson, 817 P.2d 327 (Utah 1991).

Consistent throughout the State of Utah's arguments, and demonstrated again in this Court, is the State's failure to recognize that the trial court necessarily found custodial interrogation as a threshold requirement when it denied Mr. Sampson's Motion to Suppress on the grounds that he had been informed of his rights, understood them and voluntarily waived them. Additionally, the State of Utah has been and remains unable and/or unwilling to recognize important distinctions announced by this Court between Miranda violations and fifth amendment violations, and between right to silence cases and right to counsel cases.

Mr. Sampson responds to the State of Utah's arguments by illustrating the correctness of the Utah Court of Appeals' opinion

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1. Notably, Mr. Sampson had indicated from his Motion to Suppress on through direct appeal that the subsequent warnings were inconsequential because the equivocal request for counsel had never been clarified nor counsel provided and that police, not he, initiated the subsequent discussions.

and the appropriateness of the Utah Supreme Court's refusal to review the decision.

I. THE UTAH COURT OF APPEALS CORRECTLY HELD THAT MR. SAMPSON'S FIFTH AMENDMENT RIGHTS AGAINST SELF-INCRIMINATION WERE VIOLATED WHEN POLICE OFFICERS FAILED TO CLARIFY HIS EQUIVOCAL REQUEST FOR COUNSEL WHILE UNDERGOING CUSTODIAL INTERROGATION.

A. REASONS FOR DENYING STATE'S PETITION ON POINT I

The State of Utah requests this Court in its point I to resolve whether a polygraph examination is itself a custodial interrogation requiring Miranda warnings. That request is inappropriate because the Utah Court of Appeals did not indicate that a polygraph examination resolved the issue of custodial interrogation. The fact Mr. Sampson took a polygraph examination is only one of a totality of circumstances which demonstrated custodial interrogation. The Court of Appeals decided that the trial court examined and necessarily found custodial interrogation to have existed anticipatory to its "conclud[ing] that defendant was informed of his rights, understood his rights, and voluntarily waived them--conclusions which would be irrelevant if the court thought there had been no custodial interrogation." Sampson, 808 P.2d at 1104. The appellate court's analysis, consistent with its obligation to review for correctness, assured as accurate the trial court's conclusions of law. Id. at 1103-04 (citing, inter alia, Diversified Equities, Inc. v. American Savings & Loan Assoc., 739

P.2d 1133, 1136 (Utah Ct. App. 1987); and Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985)).

The Utah Court of Appeals reserved reaching the question the State now poses to this Court; the appellate opinion, however, leaves no doubt it resolved the custodial interrogation question in favor of Mr. Sampson, as had the trial court. Id. at 1107-08 ("unless we find that defendant's Miranda rights were adequately protected by reason of the exchange at the outset of the polygraph examination undertaken by Sgt. Elliot, there was no adequate 'Mirandizing' of defendant before he gave his custodial confession") and at 1112 ("the State, as to the range of Miranda issues, made a deliberate tactical decision to rely solely on the theory that defendant was not subjected to 'custodial interrogation' at the time of the polygraph examination, . . . an issue which has now been resolved in defendant's favor"). In passing on the appropriateness of the conclusion of custodial interrogation, the Court of Appeals painstakingly reviewed decisions of this Court and the Utah Supreme Court to establish the correctness of the conclusion below. Id. at 1104-08 (citing, inter alia, Berkemer v. McCarty, 468 U.S. 420 (1984); State v. Kelly, 718 P.2d 385 (Utah 1986); and Salt Lake City v. Carner, 664 P.2d 1168 (Utah 1983)).

Contrary to the State of Utah's assertion that the Court of Appeals had only the fact that Mr. Sampson took a polygraph examination to enable a finding of custodial interrogation (Petition of State of Utah at page 9), the court looked at the totality of circumstances, only one of which was the polygraph examination. The

court identified five factors to be balanced and analyzed numerous other facts to support the correctness of the conclusion of custodial interrogation. Sampson, 808 P.2d at 1105 (citing, Salt Lake City v. Carner, 664 P.2d at 1171; and State v. Herrera, 49 Or. App. 1075, 621 P.2d 1209 (1980)).

The Utah Court of Appeals articulated two factors, numbers 2 and 4, the focus of the investigation (i.e., State conceded Mr. Sampson was the only suspect prior to instructing him to take polygraph) and the form of the interrogation (i.e., accusatory nature of polygraph questions), as the most heavily weighted in favor of determining custody. Sampson, 808 P.2d at 1105. The fact that Mr. Sampson was taking a polygraph examination factored into the court's balancing, but it was not the only, nor the most compelling circumstance in that analysis. Id.

Included in the appellate court's determination of custody were the following articulated facts: the site of the interrogation was the police station; Mr. Sampson was restrained, albeit limitedly, by the connections to the polygraph machine; he was the focus of the investigation and under suspicion for murder and/or kidnapping; he had not been instructed that he was free to go; and, the questioning during and after the examination was accusatory in nature. Id. at 1105-06.

Other facts present in the record and before the court were as follows: Mr. Sampson was "instructed" not invited to return to the police station for a polygraph test; Sgt. Elliot told Mr. Sampson at least two times that there were two things "that we

needed to show" or "accomplish" before they "walk[ed] out of here"; the examination occurred in a so-called interrogation room eight feet by ten feet in size containing one desk and two chairs, a tape recorder and the polygraph equipment; the interrogation room was just off the main squad room with approximately twenty to twenty-five officers working there at the time of the interrogation; Sgt. Elliot read Mr. Sampson his Miranda rights informing him he was in the "cop shop"; from his arrival at the station, Mr. Sampson was never left alone; suspicion existed that Mr. Sampson had injured or killed the child; Sgt. Elliot indicated he did not know whether Mr. Sampson was free to go once he arrived for the examination inasmuch as he was aware Mr. Sampson was the only suspect; and, Sheriff Hayward conceded that he possibly would not have let Mr. Sampson leave had he so desired. See Opening Brief and Reply Brief of Mr. Sampson and citations to record therein, pages 18-20 and 5-9, respectively.

These enumerated factors from the record and from the opinion support that under a totality of the circumstances, Mr. Sampson was in custody and being interrogated from the inception of the reading of the Miranda warnings by Sgt. Elliot. Accordingly, the Petitioner's position is without merit, and this Court should not grant the State of Utah's petition pursuant to its point I.

B. REASONS FOR DENYING STATE'S PETITION ON POINT II

Neither should this Court grant the State of Utah's petition on point II. In point II, Petitioner is asking this Court to rule on an issue of purported gratuitous Miranda warnings without the Utah Court of Appeals having indicated the warnings were in any way gratuitous. Several reasons exist why this Court should not consider the Petitioner's request for this Court to determine what effect should be given to an equivocal request for counsel following gratuitous Miranda warnings. First, the Miranda warnings were not gratuitously given to Mr. Sampson As indicated above, the Utah Court of Appeals' decision affirmed that portion of the trial court's conclusions indicating, by necessity, that Mr. Sampson was in custody and being interrogated at the inception of the polygraph. By finding that Mr. Sampson equivocally invoked the right to counsel at the inception of the polygraph when he responded to the warnings of Sgt. Elliot, the Court of Appeals has decided those warnings were significantly, not gratuitously, given. Once warned of his right to counsel, Mr. Sampson could not then be unwarned of that right.

The second reason this Court should not grant Petitioner's point II is because the State of Utah is raising the question of gratuitous warnings for the first time before this Court, having failed to raise the claim before the Utah Court of Appeals, including even on rehearing when the potential issue was purportedly revealed in the initial opinion of the court. This

Court has long held that it will not review for the first time on petition for writ of certiorari a claim not properly raised below and addressed by the lower court. Delta Airlines v. August, 450 U.S. 346, 362 (1981) (question presented in petition but not to court of appeals is not properly before us). See, also, United States v. Mendenhall, 446 U.S. 544, 551-52 n.5 (1980); Adickes v. Kress & Co., 398 U.S. 144, 147 n.2 (1970); and Youakim v. Miller, 425 U.S. 231, 234 (1976).

The third reason for this Court to reject the issue presented in point II of the State of Utah's petition is that, even assuming the warnings were gratuitous, the right to counsel was nonetheless equivocally invoked, demanding that police officers clarify that request as instructed by United States v. Smith, 469 U.S. 91 (1984), and State v. Griffin, 754 P.2d 965 (Utah Ct. App. 1988). Moreover, an Eleventh Circuit Court of Appeals opinion indicates the correctness of that analysis. In Tukes v. Dugger, 911 F.2d 508 (11th Cir. 1990), cert. denied, Singletary v. Tukes, 112 S.Ct. 273 (1991), the court noted,

> If the state were free to tell a suspect that he had the right to an appointed lawyer, but could, while continuing to interrogate, refuse to provide the lawyer on the ground that the suspect was not actually in custody, the suspect would be led to believe that no request for counsel would be honored. The coercive effect of continued interrogation would thus be greatly increased because the suspect would believe that the police "promises" to provide the suspect's constitutional rights were untrustworthy, and that the police would continue to violate those rights as they wished, regardless of assurances to the contrary.

Id. 911 F.2d at 516 n.11.

The Supreme Court of Alabama relied on Tukes v. Dugger to decide that the question of custody is no longer critical where a police officer provides yet unrequired warnings which are then invoked by the suspect.

> [C]ustody is not crucial to our holding in this case. We hold that once a police officer informs a person of his or her rights under Miranda, the police must honor that person's exercise of those rights even if the individual is not in custody. Although the Miranda warnings may not have been required if . . . interrogation was noncustodial, once the police officer advised [the suspect] of her rights he was bound to honor her exercise of those rights.

Ex Parte Comer v. State, 1991 WL 175446, at page 3 (Ala. Aug. 16, 1991) (citing Tukes v. Dugger, 911 F.2d 508 (11th Cir. 1990) (footnote omitted)).

A very recent Tenth Circuit Court of Appeals' opinion provides additional rationale for this position and comports with the propriety of the Utah Court of Appeals' decision. In United States v. Kelsey, 50 Cr.L. 1324 (10th Cir. Dec. 20, 1991), the court rejected the government's argument that invocation of the right to counsel is gratuitous unless and until a suspect is subjected to custodial interrogation. Relying on Arizona v. Roberson, 486 U.S. 675 (1988), the Tenth Circuit stated that when a suspect requests counsel, a presumption arises "that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance." Kelsey, 50 Cr.L. at 1325 (quoting Roberson, 486 U.S.

at 683).[2]

When Sgt. Elliot informed Mr. Sampson of his rights at the beginning of the polygraph examination, Mr. Sampson responded with an equivocal request to invoke the right to have counsel assist him in dealing with the inquiries about to take place. Having once alerted and educated Mr. Sampson to his right to have a lawyer assist him, Sgt. Elliot should not then be able to nullify the desire of Mr. Sampson to exercise that right and have legal assistance by arguing, "Well, it was too early to tell him he had the right to a lawyer." By labeling the warnings by Sgt. Elliot as gratuitous, the State of Utah argues that very point. The fifth amendment right to counsel requires more than that urged by the State of Utah. This Court should reject Petitioner's claim of gratuitous and insignificant warnings and allow to stand the Utah Court of Appeals' decision that Mr. Sampson's equivocal request for counsel required clarification to assess his desires; and without that clarification, statements and evidence subsequently acquired violate constitutional strictures requiring exclusion of the evidence. Sampson, 808 P.2d at 1112.

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2. The request for counsel in Kelsey was unequivocal. Nonetheless, the body of law regarding equivocal requests for counsel stems directly from Miranda and Roberson, which both indicate that when a suspect's right to counsel is indicated in any manner that the Edwards' line of cases is accessed and controlling. Smith v. Illinois, 469 U.S. 91 (1984) (indicating that the only difference between unequivocal and equivocal requests for counsel is that police must cease questioning if counsel is unequivocally invoked, and must clarify before continuing interrogation if equivocally invoked).

The final reason this Court should not grant the State's petition on its asserted point II is because no conflict exists between the circuits as claimed by the petitioner. The State of Utah asserts that Davis v. Allsbrooks, 778 F.2d 168 (4th Cir. 1985), conflicts with the Tukes v. Dugger position outlined above. Davis v. Allsbrooks, however, deals with a much narrower question of whether the reading of Miranda warnings to a suspect creates custody. 778 F.2d at 172. The Allsbrooks' court analyzed that position, ruling that the isolated act of reading Miranda warnings to a suspect does not create custody. Id. As such, the Allsbrooks court's decision is not inconsistent with Tukes v. Dugger as claimed by Petitioner but actually permits, for example, the Supreme Court of Alabama in Ex Parte Comer to rely on Tukes v. Dugger for a holding recognizing an invocation of the right to counsel while contemporaneously citing Davis v. Allsbrooks in a footnote to explain that custody technically did not exist. See Ex Parte Comer, 1991 WL 175446 at page 3 and page 5 n.2.

For the above reasons, this Court should not grant the State's petition on its asserted point II. The question is not properly before the court; the appellate court decision is correct and consistent with competent case law; and no genuine conflict exists on the question.

C. REASONS FOR DENYING STATE'S PETITION ON POINT III

In point III of its petition, the State of Utah requests this Court to review the Sampson opinion to clarify which of three views courts should utilize to analyze equivocal requests for counsel. State's petition at pages 16-17. This Court observed that three standards existed to examine claims of equivocal requests for counsel in Smith v. Illinois, 469 U.S. 91 (1984), but refrained from selecting one of the views as most appropriate. The Court identified the three standards as: (1) all questioning must cease upon any request for or reference to counsel; (2) define a threshold standard of clarity for such references to determine whether the reference triggers the right to counsel; and (3) only questions designed to clarify an arguably equivocal statement are permitted and no interrogation may continue until the statement is clarified or counsel is provided. Id. at 96 n.3.

This Court need not grant the State of Utah's petition on this third question it presents because the opinion of the Utah Court of Appeals, like the decision below in Smith, can be affirmed regardless of which standard is applied. See Id. at 96. The first standard requires all questioning to cease upon any request for or reference to counsel. Mr. Sampson's statement responding to the Miranda warnings was, "Well, uh, should I have a lawyer, I mean, well, I'm really not worried about anything, it's just that . . . ." Sampson, 808 P.2d at 1102. This statement would meet the first standard as the statement by Mr. Sampson is a reference to

counsel which fits within the broad language allowing any request or reference to suffice. Because questioning did not completely cease after this reference, standard number one would require affirming the Utah Court of Appeals' opinion.

The second standard would similarly require the appellate court's decision to be affirmed. Mr. Sampson's statement, noted above, fits within a threshold standard of clarity for references to counsel triggering the right to counsel because it is of a nature equal to or surpassing similar statements or references which a majority of courts have identified as sufficient to invoke the fifth amendment right to counsel. Other statements found to be equivocal invocations of the right to counsel are: "Maybe it would be good to have a lawyer?" United States v. Prestigiacomo, 504 F.Supp. 681 (E.D.N.Y. 1981); "Why should I not get an attorney?" United States v. Cherry, 773 F.2d 1124 (5th Cir. 1979); "Maybe I should have an attorney." Maglio v. Jago, 580 F.2d 202, 205 (6th Cir. 1978); "I had better talk to a lawyer." United States v. Clark, 499 F.2d 802, 805 (4th Cir. 1974); "Might want to talk to a lawyer." United States v. Fouche, 776 F.2d 1398, 1404 (9th Cir. 1985); "I would like to have a lawyer, but I'd rather talk to you." Nash v. Estelle, 597 F.2d 513, 516 (5th Cir. 1979); "Do you think I need an attorney?" State v. Smith, 661 P.2d 1001, 1003 (Wash. App. 1983); and "When do you think I'll get to see a lawyer?" Hall v. State, 326 S.E.2d 812, 818 (Ga. 1985). See, also, Sampson, 808 P.2d at 1108-09 (additional cases cited therein demonstrating threshold equivocal references to counsel similar to that made by Mr. Sampson).

The third standard identified by this Court in Smith v. Illinois, of course, is the standard actually employed in this case by the Utah Court of Appeals.[3] Notably, that analysis is not attacked in this petition by the State of Utah as inaccurate or erroneous. The appellate court expressly found the statement by Mr. Sampson sufficient to invoke his right to counsel and that the fifth amendment to the United States Constitution was violated when Sgt. Elliot failed to clarify that request and proceeded with the polygraph and subsequent interrogation.

Accordingly, point III in the State's petition should not be accepted for review as this case is simply not the vehicle to clarify which of the three approaches is preferred by this Court.

II. THE UTAH COURT OF APPEALS PROPERLY APPLIED THE EXCLUSIONARY RULE IN THIS CASE.

The State of Utah's final claim in its petition is that the Court should review and clarify the question of admissibility of physical evidence seized after a Miranda violation. The request illustrates the State's inability and/or unwillingness to understand the opinion from the Utah Court of Appeals and to differentiate between a Miranda violation and a fifth amendment violation and between the right to silence and the right to counsel.

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3. Subsequent to Smith v. Illinois, a separate panel of the Utah Court of Appeals authored State v. Griffin, 754 P.2d 965 (Utah Ct. App. 1988), selecting as Utah's position--from the three available choices--the clarification approach employed by the panel in Sampson. Id. at 969; Sampson, 808 P.2d at 1109.

The Utah Court of Appeals explicitly held that the police failure to clarify the equivocal request for counsel made by Mr. Sampson was an error of constitutional magnitude, a violation of the fifth amendment. Sampson, 808 P.2d at 1112 (direct appeal portion of the opinion) and at 1114-17 (rehearing portion of the opinion). Petitioner raised this claim as a new matter on rehearing before the Utah Court of Appeals. Id. at 1112. The Court of Appeals rejected the claim because the State of Utah confused the issues by relying on technical Miranda violation cases and right to silence cases to make its point. Id. at 1113-14 (citing, Oregon v. Elstad, 470 U.S. 298 (1985); and Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1985), cert. denied, 479 U.S. 909 (1986).

The appellate court distinguished these and other cases cited by the State of Utah as factually and legally distinct from the Sampson case. Sampson, 808 P.2d at 114-15 nn. 24-25. The analysis and reasoning of the Utah Court of Appeals is detailed and sound. The challenge by the State of Utah in its petition does not address the court's conclusions because it neglects the elevated position of the right to counsel. This Court has explained the basis for treating this right with more importance.

> The rule in Miranda . . . was based on this Court's perception that the lawyer occupies a critical position in our legal system because of his unique ability to protect the fifth amendment rights of a client undergoing custodial interrogation. Because of this special ability of the lawyer to help the client preserve his fifth amendment rights once the client becomes enmeshed in the adversary process, the Court found that "the right to have counsel present at the interrogation is

> indispensable to the protection of the fifth amendment privilege under the system" established by the Court.

Arizona v. Roberson, 486 U.S. 675, 682-83 n.4 (1988) (citing, Fare v. Michael C., 442 U.S. 707, 719 (1979)).

The Roberson Court, citing Michigan v. Mosley, 423 U.S. 96, 101 n.7 (1975), further clarified the existence of the distinction between a suspect's decision to cut off questioning (i.e., right to silence) and a request for assistance of counsel. 486 U.S. at 683. While Mosley held that police must immediately cease the interrogation once the right to silence has been asserted, that opinion permitted police to resume interrogation after the passage of a significant time period and after providing a fresh set of Miranda warnings. 423 U.S. at 106. The Roberson Court, however, rejected that same position regarding the request for the right to counsel. Regarding the right to have counsel present during questioning, the Court adhered to the "bright-line" rule of Edwards v. Arizona, 451 U.S. 477 (1981), that interrogation must immediately cease and may not resume even after an extended period of time and even with new Miranda warnings unless and until the attorney is provided or the suspect initiates the questioning. Roberson, 486 U.S. at 682.

These cases solidify the constitutional nature of the violation in Sampson and elucidate why a right to counsel case or technical violation case, like Oregon v. Elstad, Martin v. Wainwright and the others cited by Petitioner, are insufficient to justify granting the petition as urged by the State. The Utah Court

of Appeals' analysis and holding withstands the continued assertion by the State that the violation was technical only. This Court should deny the State of Utah's request regarding point IV of its petition. The exclusionary rule is properly applied to this case.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted this 23 day of January, 1992.

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APPENDIX A

for Elm simply said at the end of the sentencing hearing: "Your Honor, just for the purpose of the record, may we express our objection to the sentencing so we may be able to preserve that for purposes of appeal?"

The only exception to the rule that objections need to be timely and specific in order to be considered on appeal is if the alleged error constitutes "plain error." Utah R.Evid. 103(d); *Whittle* at 821; *see State v. Eldredge*, 773 P.2d 29, 35–36 (Utah), *cert. denied*, 493 U.S. ——, 110 S.Ct. 62, 107 L.Ed.2d 29 (1989) (detailed analysis of Utah R.Evid. 103(d)). In order for an error to be "plain," an appellate court must find that it should have been obvious to the trial court that it was committing error. *Eldredge* at 35. We have examined the records of the sentencing hearing and the arguments of both parties. None of the errors cited rise to the level of "plain error."

The sentence is affirmed.

HALL, C.J., and STEWART, DURHAM and ZIMMERMAN, JJ., concur.

STATE of Utah, Plaintiff and Appellee,

v.

Carlos R. SAMPSON, Defendant and Appellant.

No. 890327–CA.

Court of Appeals of Utah.

Sept. 11, 1990.

On Rehearing March 15, 1991.

Defendant was convicted of murder. Judgment was entered in the Third District Court, Salt Lake County, David S. Young, J. Defendant appealed. The Court of Appeals, Orme, J., held that: (1) defendant was in custody at time he made inculpatory statements, so as to be required to be given proper *Miranda*, warnings; (2) defendant had not waived right to be represented by attorney when he stated to officer administering polygraph test that "should I have a lawyer, I mean * * * I'm really not worried about anything, it is just that * * *"; (3) police did not achieve clarification of equivocal request for counsel by repeating *Miranda* warnings; and (4) police violation did not constitute mere technical failure to comply with *Miranda* rules, but was a Fifth Amendment violation requiring suppression of confession and related evidence.

Affirmed.

1. Criminal Law ⇐1158(4)

In determining whether *Miranda* warnings were properly given, appeals court does not accord any particular deference to trial court's conclusions, although couched as findings, but rather reviews them for correctness.

2. Criminal Law ⇐517.2(3)

Defendant in murder case had been subject to custodial interrogation and was entitled to proper *Miranda* warnings at time he confessed to having killed his daughter; police had focused on him as perpetrator, to exclusion of other possibilities, almost from time he first reported daughter as missing, and prior to statement defendant had been subjected to accusatory questions. U.S.C.A. Const.Amend. 5.

3. Criminal Law ⇐414

State has heavy burden to establish both that defendant understood his *Miranda* rights and that he voluntarily waived them. U.S.C.A. Const.Amend. 5.

4. Criminal Law ⇐412.2(5)

Defendant in murder case did not knowingly and intelligently waive *Miranda* rights by stating, prior to submitting to lie detector test administered in police station and after receiving *Miranda* warnings, that "should I have a lawyer * * * I'm really not worried about anything, it is just that * * *"; only response administrator

of test was allowed to make following that statement was clarification as to intent of defendant, and instead of seeking clarification administrator stated "okay, if you are not worried about anything I would say that is fine." U.S.C.A. Const.Amend. 5.

On Petition for Rehearing

5. Criminal Law ⇐412.2(3, 4)

Repetition of *Miranda* warnings, following defendant's equivocal request for counsel, did not authorize police to continue interrogation of defendant; equivocal request was required to be treated by police and analyzed by courts as though it were an unambiguous request for counsel, until such time as it had been properly clarified and shown to be otherwise. U.S.C.A. Const.Amend. 6.

6. Criminal Law ⇐412.2(4), 517.2(1), 537

Police response to murder suspect's equivocal request for counsel, repetition of *Miranda* warning and continuation of interrogation, was not a mere technical violation of *Miranda* rules; it constituted a Fifth Amendment violation requiring suppression of confession and derivative evidence. U.S.C.A. Const.Amend. 5.

Andrew A. Valdez, Elizabeth A. Bowman, argued, and Richard G. Uday, argued, Salt Lake Legal Defender Ass'n, Salt Lake City, for defendant and appellant.

R. Paul Van Dam, State Atty. Gen., and Charlene Barlow, argued, Asst. Atty. Gen., Salt Lake City, for plaintiff and appellee.

Before BILLINGS, GREENWOOD and ORME, JJ.

OPINION

ORME, Judge:

Defendant appeals his conviction for criminal homicide, murder in the second degree, a first degree felony in violation of Utah Code Ann. § 76-5-203 (1990). We reverse and remand for a new trial.

On November 24, 1986, at approximately 10:30 p.m., defendant entered a 7-Eleven store in Salt Lake County and told the clerks that his daughter had been kidnapped. He asked them to call the police, which they did.

Deputies from the Salt Lake County Sheriff's Office responded. Defendant informed them that his daughter had been abducted from his truck. He gave them a description of his daughter and a photograph. The officers investigated the alleged kidnapping until 4:00 a.m. At some point during the evening, defendant was informed the police did not believe his story. The officers asked defendant to come to headquarters the following morning for a polygraph examination. He agreed.

At approximately 10:30 a.m. on November 25, defendant arrived at police headquarters. He was met by the polygraph examiner, Sergeant Elliot, who had been briefed about the events which occurred on the prior evening. Defendant was escorted to a small interrogation room, hooked up to a polygraph machine, and instructed about how polygraph machines worked. Sgt. Elliot then explained the purpose for giving defendant the test. He said:

> When we walk out of here we ought to be able to tell the detectives Carlos is truthful when he says the child was taken out of the truck, he had not prearranged with anyone to take the child. Uh, also, Carlos is not involved in the death of the child if the child is, in fact, dead. And, uh, those are the two things that we will accomplish today.[1]

After explaining to defendant the purpose of the test, Sgt. Elliot gave defendant the *Miranda* warnings. He began by stating: "Because you are in the cop shop

1. These purposes were again repeated during the exam, with even more specificity. Later in the exam, Sgt. Elliot stated:

> Okay, good, okay, uh, at the beginning of the test I told you what the things were that we needed to show. Number one is that you did not arrange with anyone to take the child but that you haven't got someone taking care of her, she is not hidden out and you are not doing this to deprive Antoinette visitation of the child. And, uh, secondly, you did nothing to injure the child and you, and if she in fact is not alive, did not cause her death, right?

there is no doubt in your mind that this is the police station and, uh, because you are in taking a polygraph from a law enforcement agency I must advise you of your rights again."[2] After reading defendant each of his rights, the following exchange ensued:

> Elliot: Okay, having these rights in mind do you wish to talk to me now.
>
> Sampson: Well, uh, should I have a lawyer, I mean, well, I'm really not worried about anything, it is just that....
>
> Elliot: Okay, if you are not worried about anything I would say that is fine, let's go ahead and proceed. Let's get this thing done and get it over with and see what we can do.
>
> Sampson: I'm willing to get it over with.

Defendant then read and signed a form listing his *Miranda* rights and indicating his willingness to take the polygraph test.

During the polygraph examination, Sgt. Elliot asked defendant whether he arranged the disappearance or caused the death of his child and whether he knew where she was hidden.[3] He asked defendant this series of questions four times. To the question concerning where his daughter was hidden, defendant responded in the negative each time and each time the polygraph suggested a deceitful response. After the last set of questions, Sgt. Elliot informed defendant about the test results. He asked defendant why his response to the question concerning whether he knew where his daughter was hidden appeared to be false. Defendant said he thought maybe the child's mother had done something with her.

After concluding the examination, Sgt. Elliot and defendant went to find Salt Lake County Sheriff Pete Hayward. Sgt. Elliot told Sheriff Hayward about the test results. He told him that he believed defendant had been untruthful and informed him that defendant had been "Mirandized," but apparently did not acquaint the sheriff with the particulars of defendant's responses after his rights had been read to him.

Sheriff Hayward then returned with defendant to the polygraph room for further questioning. He did not give defendant the *Miranda* warnings.[4] He informed defendant that there were inconsistencies in his story and that he did not believe defendant was telling the truth. He then asked defendant whether he had injured his daughter. Ultimately, defendant stated his daughter was dead and that he could show the police where she was located.

Defendant accompanied Sheriff Hayward and another deputy to a dumpster in American Fork where his daughter's body was located. After retrieving the body, the officers placed defendant under arrest and returned him to Salt Lake City. When the officers again met with defendant, defendant was read his *Miranda* rights. He agreed to talk with the investigating officer, who thereafter questioned him concerning the circumstances surrounding his daughter's death.

Prior to trial, defense counsel filed a motion to suppress all statements made by defendant during and after the polygraph examination on November 25, 1986, and all evidence derived as a result of those statements. Counsel argued that the police officers had violated defendant's *Miranda* rights by continuing to question him after he made an equivocal request for counsel. The trial court denied the motion.

In support of its decision to deny defendant's motion to suppress, the court stated in pertinent part:

2. It is not clear from the record why Sgt. Elliot stated that he had to advise defendant of his rights "again." It is clear, however, that the first and only *Miranda* warnings defendant received prior to his formal arrest were given by Sgt. Elliot at the outset of the polygraph examination.

3. The specific inculpatory questions asked during the examination were:

> 1) Have you caused the death of Miyako?
>
> 2) Do you know where Miyako is hidden now?
>
> 3) Have you arranged the disappearance of Miyako?

4. It is not entirely clear why the sheriff did not give defendant his *Miranda* warnings. Apparently, however, he relied upon Sgt. Elliot's explanation that defendant had been "Mirandized."

The court finds, first, that as you have agreed, the standard of evidence must be a preponderance of the evidence [5] to establish the voluntariness of the interrogation and waiver.

Court finds that the defendant clearly understood what his rights were and what he was waiving, that there is nothing in the record to show that the police did anything or acted in any way improperly so as to constitute any kind of coercion [6] in this matter so as to cause the defendant not to fully understand his rights and to leave him in a position where he was acting in a coerced sort of way....

I believe he had an unfettered right of choice, that he did not request an attorney, that the language "Well, ah, should I have a lawyer, I mean, well, I'm really not worried about anything, it is just that ..." is not sufficient to cause the police to be concerned as to the claim or any suggestion that the defendant wished to claim a right to counsel.

I also find that there was no need to give continuous advice as to subsequent requests for the selection of counsel [7] or the waiver of the same.

I also find further that the forum was adequate, the [rights] were clearly explained to the defendant. He voluntarily and knowingly waived his right to counsel and I cannot find that the motion to suppress should be granted and, therefore, it is denied.

A five-day jury trial was held in September 1987. Having lost his motion to suppress, defendant sought and obtained a continuing objection to the admission of evidence resulting from the police interrogation. At the conclusion of the trial, the jury found defendant guilty of second degree homicide. He was sentenced to a term of five years to life at the Utah State Prison.

Defendant has raised numerous issues on appeal, but his primary contention is that the court committed prejudicial error when it denied his motion to suppress. Because we must reverse and remand on this issue, we need not address the other issues raised by defendant.

[1] Neither party has identified the standard of review for this appeal. However, both parties apparently concede that the trial court's ultimate conclusions concerning the waiver of defendant's *Miranda* rights, which conclusions were based upon essentially undisputed facts, in particular the transcript of Sgt. Elliot's colloquy with defendant, present questions of law reviewable under a correction-of-error standard. Such a conclusion is consistent with the general notion that a trial court's "findings" based upon undisputed facts present questions of law on appeal. *Diversified Equities, Inc. v. American Sav. & Loan Assoc.*, 739 P.2d 1133, 1136 (Utah Ct.App. 1987) (quoting *City of Spencer v. Hawkeye Sec. Ins. Co.*, 216 N.W.2d 406, 408 (Iowa 1974)). *Cf. Transamerica Cash Reserve, Inc. v. Dixie Power & Water, Inc.*, 789 P.2d 24, 25 (Utah 1990) (same standard for review of summary judgment, which necessarily involves undisputed facts). *See also People v. Russo*, 148 Cal.App.3d 1172, 196 Cal.Rptr. 466, 468 (1983) (where *Miranda* warnings and ensuing discussion were recorded, facts deemed undisputed and appel-

5. At least one Utah case has recognized "preponderance of the evidence" as the appropriate standard for determining the voluntariness of a waiver of *Miranda* rights. *See State v. Moore*, 697 P.2d 233, 236 (Utah 1985). The preponderance standard is difficult to square with *Miranda*'s holding that the state bears a heavy burden, if counsel was not present, to show a knowing and intelligent waiver of the defendant's *Miranda* rights. *See Miranda v. Arizona*, 384 U.S. 436, 475, 86 S.Ct. 1602, 1628, 16 L.Ed.2d 694 (1966). Nonetheless, the United States Supreme Court has adopted the "preponderance of the evidence" test in evaluating *Miranda* waiver questions. *Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515, 523, 93 L.Ed.2d 473 (1986).

6. The court's comment on coercion represents a bit of an overstatement in view of *Miranda*'s recognition that custodial interrogation is inherently coercive. *See* 384 U.S. at 467, 86 S.Ct. at 1624.

7. Despite the court's phraseology in its remarks from the bench, it is apparent from the record that defendant never made any "subsequent requests" for counsel after his statement to Sgt. Elliot.

late court required to "independently assess whether [defendant] knowingly and intelligently waived his rights"). Thus, we do not accord any particular deference to the trial court's conclusions, although couched as findings, but, rather, review them for correctness. *Scharf v. BMG Corp.*, 700 P.2d 1068, 1070 (Utah 1985).

In *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), the United States Supreme Court stated that "the prosecution may not use statements ... stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.* at 444, 86 S.Ct. at 1612. One of those procedural safeguards is a warning that the defendant has the right to an attorney during custodial interrogation. *Id.* Moreover, the Court noted that if defendant "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." *Id.* at 444–45, 86 S.Ct. at 1612. Finally, when custodial interrogation continues without the presence of a defense attorney and damaging evidence results from the interrogation, the state has a heavy burden to show that the defendant knowingly and intelligently waived his *Miranda* rights. *Id.* at 475, 86 S.Ct. at 1628.

We must address two questions in this appeal. First, we must determine whether defendant was subject to "custodial interrogation" at the time he made his incriminating statements. Second, assuming custodial interrogation, we must determine whether defendant requested, or knowingly and intelligently waived his right to, counsel.

CUSTODIAL INTERROGATION

[2] Initially, defendant claims the state failed to raise below the issue of whether there actually was a "custodial interrogation" and thus should be precluded from arguing on appeal that there was not. *See generally State v. Marshall*, 791 P.2d 880, 885–87 (Utah Ct.App.1990). Though we agree the state did not dwell on the issue, it was sufficiently raised at the suppression hearing to be preserved for this appeal. We note, however, that the trial court did not base its denial of the motion to suppress upon the lack of custody nor intimate any doubt that the colloquy between Sgt. Elliot and defendant occurred in conjunction with a custodial interrogation. Instead, it concluded that defendant was informed of his rights, understood his rights, and voluntarily waived them—conclusions which would be irrelevant if the court thought there had been no custodial interrogation.

In *Miranda*, the United States Supreme Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966). The Court expanded on this definition in *Oregon v. Mathiason*, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977) (per curiam). "*Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'" *Id.* at 495, 97 S.Ct. at 714. Later, in *California v. Beheler*, 463 U.S. 1121, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983) (per curiam), the Court stated that "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Id.* at 1125, 103 S.Ct. at 3520.

Moreover, the United States Supreme Court has indicated that the test is an objective one, i.e., that "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S.Ct. 3138, 3151, 82 L.Ed.2d 317 (1984). *See, e.g., Hunter v. State*, 590 P.2d 888, 895 (Alaska 1979) (The question is not whether the particular defendant considered himself in custody, but whether a "reasonable person [under the same circumstances] would feel he was not free to leave and break off police question-

ing."); *People v. Algien*, 180 Colo. 1, 501 P.2d 468, 471 (1972) (en banc).

The Utah Supreme Court has identified several key factors to consider in order to determine when a defendant

> who has not been formally arrested is in custody. They are: (1) the site of interrogation; (2) whether the investigation focused on the accused; (3) whether the objective indicia of arrest were present; and (4) the length and form of interrogation.

Salt Lake City v. Carner, 664 P.2d 1168, 1171 (Utah 1983). Another factor which we find pertinent to our analysis was recognized by our Oregon counterpart in *State v. Herrera*, 49 Or.App. 1075, 621 P.2d 1209 (1980). That factor is (5) whether the defendant came to the place of interrogation freely and willingly. *Id.*, 621 P.2d at 1212. We now apply these five factors, along with the objective standard adopted in *Berkemer*, to the undisputed facts in this case.

A brief mention of factors (1), (3) and (5) is sufficient because we find them relatively "neutral." Concerning factor (1), the site of interrogation was the police station. Station-house questioning lends itself to a finding of custody, a concept which Sgt. Elliot recognized in his "cop shop" introductory remark, although that fact alone is not conclusive. *See, e.g., Mathiason*, 429 U.S. at 495, 97 S.Ct. at 714. Considering factor (3), defendant was apparently not securely restrained or told that he was under arrest until after his daughter's body was discovered. However, it is pertinent to note that he was not specifically informed of his freedom to leave[8] and that once the polygraph examination started, he was restrained in the limited sense that he was hooked to the polygraph machine.[9] Turning to factor (5), the defendant went voluntarily to the police station after receiving an invitation to do so. The fact that he went voluntarily, however, does not mean he was free to leave during the entire remainder of the interrogation.

The two factors which conclusively tip the scale and persuade us that defendant was in custody are factors (2), the focus of the investigation, and (4), the form of the interrogation. The interplay of these two factors at the time defendant made incriminating statements would lead a reasonable person to believe that he was not free to leave.

Concerning factor (2), the state essentially concedes that the investigation in this case had focused exclusively on defendant. Before the conclusion of the evening when defendant reported the fictitious kidnapping, officers had informed defendant that they did not believe his story. As a result of their disbelief, they requested defendant to return the following morning for a polygraph test. Nothing in the record suggests other suspects were sought or questioned, or other leads pursued, in the meanwhile. The questions asked during the polygraph examination clearly indicate a strong suspicion that defendant had kidnapped or killed his own daughter. It is obvious from these facts that defendant was the prime, if not exclusive, suspect of the police investigation. A reasonable person under the circumstances would surely so have concluded, especially given the expressed disbelief at his story.

Finally, factor (4) weighs heavily in favor of a determination of custody. Utah courts have placed a great deal of emphasis on the form of the questioning in these types of cases. As long as questioning remains merely investigatory, courts have not found custody. *See, e.g., State v. Kelly*, 718 P.2d 385, 391 (Utah 1986). However, when investigatory questioning shifts to accusatory questioning, custody is likely and *Miranda* warnings become necessary. *Carner*, 664 P.2d at 1170. *See also Kelly*, 718 P.2d at 391. The change from investi-

8. Under certain circumstances, even defendants who are told they are free to leave will nonetheless be held to have been subjected to custodial interrogation. *See, e.g., United States v. Lee*, 699 F.2d 466, 467–68 (9th Cir.1982) (per curiam).

9. According to the transcript of the polygraph examination, the polygraph machine was attached to defendant by two tubes encircling his trunk, finger plates on his ring and index fingers, and a blood pressure cuff on his right arm.

gatory to accusatory questioning occurs when the "police have reasonable grounds to believe that a crime has been committed and also reasonable grounds to believe that the defendant committed it." *Carner*, 664 P.2d at 1171. *See also Kelly*, 718 P.2d at 391.

Assuming, without deciding, that the polygraph examination itself was merely investigatory,[10] we find that the questioning became accusatory when Sgt. Elliot and Sheriff Hayward determined that defendant had lied on the exam. The officers knew prior to the polygraph exam that a crime had been committed. They suspected kidnapping and possibly even murder. Moreover, they clearly suspected defendant as the perpetrator of the crime. The polygraph exam results merely confirmed their suspicions. Knowing the suspicions of the police and then being confronted with the polygraph exam results, a reasonable person in defendant's position would not have considered himself free to leave at that time.[11] Thus, we hold that, at least as of the time of Sheriff Hayward's questioning of defendant, defendant was subject to custodial interrogation and entitled to proper *Miranda* warnings.

This case is similar to, and the result we reach consistent with, the Colorado case of *People v. Algien*, 180 Colo. 1, 501 P.2d 468 (1972) (en banc). In *Algien*, the defendant, along with other individuals, was suspected of arson. 501 P.2d at 469. He voluntarily submitted to a polygraph examination. *Id.* At no time was he advised of his *Miranda* rights. *Id.*, 501 P.2d at 470. Prior to the examination he was informed that the purpose of the test was to determine his involvement in the fire. *Id.*, 501 P.2d at 469–70. He was then asked questions concerning his guilt. *Id.* The exam was given three times and each time the test indicated his negative responses were not truthful. *Id.*, 501 P.2d at 470. At the conclusion of the test, he was confronted with the opinion that he was lying and, after discussing the matter, defendant confessed. *Id.*

The trial court in *Algien* found that once the officers concluded defendant was lying during the exam, the suspicion of guilt focused on him and the officers should have read him his *Miranda* rights. *Id.* The Colorado Supreme Court agreed with the trial court and held that "a reasonable person would with logic conclude that he could not leave the premises of his own free will but would be detained for formal arrest." *Id.* at 471. Consequently, it affirmed the decision of the trial court to suppress defendant's confession.

Other courts have applied an *Algien*-type analysis to post-polygraph confessions. *See, e.g., State v. Wright*, 97 N.J. 113, 477

10. In view of the result we reach, we need not decide in this case whether the polygraph examination as such was accusatory interrogation and whether defendant was in custody from the inception of the exam. We note, however, that numerous courts have leaned toward finding such examinations to be custodial, a view which seems to command majority support and to be well-reasoned. *See, e.g., State v. Wright*, 97 N.J. 113, 477 A.2d 1265, 1269 (1984) (noting that strict *Miranda*-type analysis is typically applied to polygraph confessions); *Commonwealth v. Bennett*, 439 Pa. 34, 264 A.2d 706, 707 (1970) (state's suggestion that defendant was not in custody for polygraph was "attempt to have [court] submerge [its] intelligence"); *State v. Faller*, 88 S.D. 685, 227 N.W.2d 433, 435 (1975) ("situation a lie detector test presents can best be described as a psychological rubber hose"); *Creeks v. State*, 542 S.W.2d 849, 851 (Tex.Cr.App.1976) (where investigation has focused on defendant, *Miranda* warnings required before polygraph); *People v. Carter*, 7 Cal.App.3d 332, 88 Cal.Rptr. 546, 549 (1970) ("Questioning during the course of a lie detector test certainly qualifies as a form of custodial interrogation."), *overruled on other grounds*, 6 Cal.3d 441, 492 P.2d 1, 99 Cal.Rptr. 313 (1972). *But see, e.g., Whalen v. State*, 434 A.2d 1346, 1352 (Del.1980) ("appearance at the police station for the polygraph test demonstrates a waiver of his *Miranda* rights"), *cert. denied*, 455 U.S. 910, 102 S.Ct. 1258, 71 L.Ed.2d 449 (1982); *People v. Bailey*, 140 A.D.2d 356, 527 N.Y.S.2d 845, 847–48 (1988) (willingness to aid in investigation demonstrated that polygraph not custodial).

11. The state cites testimony to the effect that defendant did not consider himself under arrest even after he was formally arrested, suggesting this demonstrates that defendant could not have believed he was in custody when he first confessed. This evidence is at most a commentary on defendant's acumen. Under the objective "reasonable person" test, defendant's subjective belief about custody is not relevant. *Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S.Ct. 3138, 3151, 82 L.Ed.2d 317 (1984).

A.2d 1265, 1269 (1984) ("When defendants are not advised of their *Miranda* rights, or do not properly waive them, confessions elicited *after* a polygraph test are typically suppressed."); *People v. Harris*, 128 A.D.2d 891, 513 N.Y.S.2d 817, 818 (1987) (mem.) (confession admissible because defendant appeared voluntarily for polygraph test and fully advised of rights before post-polygraph confession). The rationale of these polygraph cases comports with our view of custodial interrogation and thus we adopt their reasoning in this case.

We need not decide whether defendant was in custody from the inception of the polygraph examination[12] because no confession was elicited until after the exam was completed and the sheriff summoned. It is sufficient to conclude that, Sgt. Elliot having determined defendant was lying in the exam, *Miranda* warnings were necessary before further questioning could properly proceed.

It is clear from the record that defendant was not given *Miranda* warnings between the conclusion of the polygraph exam and the time he was formally arrested.[13] Thus, unless we find that defendant's *Miranda* rights were adequately protected by reason

12. *But see* note 10, *supra*. It is interesting to note that the polygraph examiner considered *Miranda* warnings at the outset of the polygraph examination to be a necessity. He stated: "Because you are in the cop shop there is no doubt in your mind that this is the police station and, uh, because you are in taking a polygraph from a law enforcement agency I must advise you of your rights...." *But see People v. Sohn*, 148 A.D.2d 553, 539 N.Y.S.2d 29, 31 (1989) (mem.) (giving of *Miranda* warnings was "apparently out of an 'excess of caution' [and did] not preclude a finding that [defendant] was not in custody").

Sergeant Elliot's approach, whether or not legally required, surely seems prudent, if for no other reason than that it forecloses the possibility a suspect will blurt out a confession after his deception has been ascertained but before *Miranda* warnings can be issued. Moreover, as an arm of the state, the police have a responsibility to protect the constitutional rights of the citizenry, and erring on the side of giving the *Miranda* warnings before they are strictly required advances that function, as well as minimizes the risk that important evidence will be excluded because the warnings were not given early enough in the process.

13. As indicated previously, Sheriff Hayward apparently relied upon Sgt. Elliot's claim that defendant had been properly "Mirandized" at the commencement of the polygraph exam. Although Sheriff Hayward, out of the same abundance of caution that may have motivated Sgt. Elliot, should ideally have given new *Miranda* warnings to defendant prior to interrogating him, the earlier warnings would have sufficed had Sgt. Elliot elicited a clear waiver of those rights from defendant at that time. *See State v. Martinez*, 595 P.2d 897, 899–900 (Utah 1979) (the law does not require repetition of *Miranda* rights within a short period of time and a continuous sequence of events even though defendant's status may actually change in the interim).

The state did not argue that Sheriff Hayward's "good faith" reliance upon Sgt. Elliot's claim he previously issued *Miranda* warnings warranted an exception to the exclusionary rule. However, we note that, contrary to the trend in the Fourth Amendment area, courts have declined to create a "good faith" exception in the context of the Fifth Amendment. *United States v. Scalf*, 708 F.2d 1540, 1544 (10th Cir.1983) (per curiam) ("once a suspect has invoked the right to counsel, knowledge of that request is imputed to all law enforcement officers who subsequently deal with the suspect"). *See also Arizona v. Roberson*, 486 U.S. 675, 108 S.Ct. 2093, 2101, 100 L.Ed.2d 704 (1988) (implicitly rejecting "good faith" argument); *White v. Finkbeiner*, 687 F.2d 885, 887 n. 9 (7th Cir.1982) (declining to create exception absent clear indication from United States Supreme Court), *vacated on other grounds*, 465 U.S. 1075, 104 S.Ct. 1433, 79 L.Ed.2d 756 (1984).

An excellent treatment of a possible "good faith" exception to the Fifth Amendment exclusionary rule is found in M. Gardner, *The Emerging Good Faith Exception to the Miranda Rule—A Critique*, 35 Hastings L.J. 429 (1984). Professor Gardner concludes:

> While there may be reason to doubt the constitutional necessity of the fourth amendment exclusionary rule, the fifth amendment privilege *is itself* a constitutionally required exclusionary rule. Whereas a fourth amendment violation occurs at the moment of the unlawful privacy violation, violations of the privilege against self-incrimination do not occur unless and until the government uses the tainted evidence against the defendant in a criminal proceeding. Although alternatives to the exclusionary rule might conceivably be developed to protect fourth amendment privacy interests, no alternative could possibly protect the fifth amendment values of maintaining an accusatorial system and respecting the dignity of criminal defendants. If use of compelled self-incriminating evidence is permitted, the fifth amendment's protection is destroyed.

Id. at 462–63.

of the exchange at the outset of the polygraph examination undertaken by Sgt. Elliot,[14] there was no adequate "Mirandizing" of defendant before he gave his custodial confession. We now examine whether defendant validly waived his *Miranda* rights at that time.

WAIVER

On appeal, defendant does not argue that the state failed to adequately inform him of his *Miranda* rights. Prior to the polygraph examination, Sgt. Elliot carefully informed defendant of each of his rights. Instead, defendant argues that he made an "equivocal request" for counsel which the state failed to clarify and, if appropriate, to honor. It is telling that the state does not address this issue on appeal, but instead puts all its eggs in the "no custodial interrogation" basket. Nonetheless, because the state stops short of conceding the point and in view of its importance, we will address the issue in some detail.

[3] Initially we note that, though a defendant may waive his rights to remain silent and to have an attorney present during custodial interrogation, "these waivers must be both intentional and made with full knowledge of the consequences, and the defendant is given the benefit of every reasonable presumption against such a waiver." *State v. Fulton*, 742 P.2d 1208, 1211 (Utah 1987), *cert. denied*, 484 U.S. 1044, 108 S.Ct. 777, 98 L.Ed.2d 864 (1988). *See also Brewer v. Williams*, 430 U.S. 387, 404, 97 S.Ct. 1232, 1242, 51 L.Ed.2d 424 (1977). Consequently, the state has a heavy burden to establish both that a defendant understood his *Miranda* rights and that he voluntarily waived them. *State v. Velarde*, 734 P.2d 440, 443 (Utah 1986).

[4] The state argued below, and the trial court found, that defendant's statement "Well, ah, should I have a lawyer, I mean, well, I'm really not worried about anything, it is just that ..." did not qualify as even an equivocal request for counsel which the police had to be concerned about. We disagree.

In *Miranda*, the United States Supreme Court stated: "If [defendant] indicates *in any manner* and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." 384 U.S. at 444–45, 86 S.Ct. at 1612 (emphasis added). Thus, a defendant's "request for counsel may be ambiguous or equivocal," *Smith v. Illinois*, 469 U.S. 91, 95, 105 S.Ct. 490, 493, 83 L.Ed.2d 488 (1984) (per curiam), and still qualify as an invocation of *Miranda* rights.

This court dealt with an equivocal request for counsel in *State v. Griffin*, 754 P.2d 965 (Utah Ct.App.1988). In *Griffin*, the defendant stated during interrogation, "This is a lie. I'm calling an attorney." *Id.* at 966. We held that this statement "was arguably equivocal." *Id.* at 969. Defendant's statement in this case was less forceful than that in *Griffin*. However, other jurisdictions have found statements very similar to the one in this case to have constituted equivocal requests for counsel. *See, e.g., United States v. Cherry*, 733 F.2d 1124, 1127 (5th Cir.1984) ("Maybe I should talk to an attorney before I make a further

14. We note that defendant was given a second set of *Miranda* warnings after he had informed Sheriff Hayward that his daughter was dead, gone with the police to American Fork to retrieve the body, been arrested, and been returned to Salt Lake City. Apparently recognizing that by that time all the damage had been done, the state does not argue the second set of *Miranda* warnings are of any consequence to our analysis.

Defendant, on the other hand, argues that because he had previously invoked his right to counsel, albeit equivocally; had not been provided an attorney; and had not initiated any subsequent interrogation with the police, the fruits of the post-arrest interrogations must also be suppressed. We agree. In *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), the United States Supreme Court held that once a defendant has invoked his right to counsel, statements made without counsel in subsequent interrogations initiated by the police, even when pursuant to renewed *Miranda* warnings, must be suppressed. *Id.* at 484–87, 101 S.Ct. at 1884–86. *See also State v. Moore*, 697 P.2d 233, 237 (Utah 1985) (accused must initiate conversation). The rule in *Edwards* applies even more forcefully in a case such as this where the subsequent interrogation is prompted by, and designed to explain, information which has come to the police as a direct result of an earlier *Miranda* violation.

statement."), *cert. denied*, 479 U.S. 1056, 107 S.Ct. 932, 93 L.Ed.2d 983 (1987); *United States v. Fouche*, 776 F.2d 1398, 1405 (9th Cir.1985) ("might want to talk to a lawyer"), *cert. denied*, 486 U.S. 1017, 108 S.Ct. 1756, 100 L.Ed.2d 218 (1988); *United States v. Prestigiacomo*, 504 F.Supp. 681, 683 (E.D.N.Y.1981) (mem.) ("maybe it would be good to have a lawyer"); *Cheatham v. State*, 719 P.2d 612, 618 (Wyo.1986) (after being asked if he wanted to talk, defendant responded "Well I don't care, I'd like to see a lawyer, too you know"); *Hampel v. State*, 706 P.2d 1173, 1176 (Alaska Ct.App.1985) ("I've got one question ... [and the question is concerning a lawyer] ... how would I be able to get one, a lawyer?"); *People v. Russo*, 148 Cal.App.3d 1172, 196 Cal.Rptr. 466, 468 (1983) ("I don't know if I should have a lawyer here or what."); *State v. Moulds*, 105 Idaho 880, 673 P.2d 1074, 1083 (Ct.App.1983) ("Maybe I need an attorney"); *State v. Smith*, 34 Wash.App. 405, 661 P.2d 1001, 1003 (1983) ("Do you think I need an attorney?"). *See also United States v. Porter*, 764 F.2d 1, 6 (1st Cir.1985) (unsuccessful call to attorney's office in presence of officer treated as equivocal request for counsel), *cert. denied*, 481 U.S. 1048, 107 S.Ct. 2178, 95 L.Ed.2d 835 (1987); *People v. Quirk*, 129 Cal.App.3d 618, 181 Cal.Rptr. 301, 308 (1982) (inquiry by defendant as to whether wife had hired an attorney treated as equivocal request for counsel). We hold that defendant's statement in this case was of a caliber similar to those just quoted, and like them, constituted an equivocal request for counsel.[15] *See also* Comment, *Equivocal Requests for Counsel: A Balance of Competing Policy Considerations*, 55 Cinc.L.Rev. 767, 770–71 (1987) [hereinafter "The Cincinnati Comment"] (categorizing recurring types of equivocal requests for counsel, including as one category "[i]ndecisive statements that indicate uncertainty in the suspect's mind about the need or advisability of obtaining legal representation").

Courts have developed different standards to handle equivocal requests for counsel. The United States Supreme Court identified three methods for handling equivocal requests in *Smith v. Illinois*, 469 U.S. 91, 95–96 & n. 3, 105 S.Ct. 490, 492–93 & n. 3, 83 L.Ed.2d 488 (1984), but declined to identify any of them as the constitutionally correct one.

> Some courts have held that all questioning must cease upon any request for or reference to counsel, however equivocal or ambiguous.... Others have attempted to define a threshold standard of clarity for such requests, and have held that requests falling below this threshold do not trigger the right to counsel.... Still others have adopted a third approach, holding that when an accused makes an equivocal statement that "arguably" can be construed as a request for counsel, all *interrogation must immediately cease except for narrow questions designed to "clarify" the earlier statement and the accused's desires respecting counsel.*

Id. at 96 n. 3, 105 S.Ct. at 493 n. 3 (emphasis added). In *Griffin*, this court adopted the third approach, holding "that when an accused makes an arguably equivocal request for counsel during custodial interrogation, further questioning must be limited to clarifying the request." 754 P.2d at 969. We remain convinced that this middle approach[16] is preferable to either of the two more extreme positions and note that it is regarded as the majority view. Note, *Judicial Approaches to the Ambiguous Request for Counsel*, 62 Notre Dame L.Rev. 460, 472 (1987) [hereinafter "The Notre Dame Note"]. It is also favored by commentators as the approach which best balances the interests of law enforcement and the rights of the accused. *See, e.g.*, Note, *Interrogation: Equivocal References to an Attorney*, 39 Vand.L.Rev. 1159 (1986) [hereinafter "The Vanderbilt Note"].

15. "Equivocal request" appears to be an imprecise term in this context. Many of the references to attorneys which are held to be equivocal requests for counsel are not requests at all. It may be preferable to refer to such statements as "equivocal references to an attorney." *See, e.g.*, Note, *The Right to Counsel During Custodial*

16. *See* The Vanderbilt Note at 1187 (clarification approach represents "a middle position").

The Right to Counsel During Custodial Interrogation: Equivocal References to an Attorney, 39 Vand.L.Rev. 1159, 1187–94 (1986); The Notre Dame Note at 472–73; The Cincinnati Comment at 783.

Unfortunately, neither Sgt. Elliot nor Sheriff Hayward attempted to clarify defendant's equivocal reference to an attorney. The transcript of the polygraph examination—and the actual tape is not part of our record—indicates a pause following defendant's equivocal statements about counsel after which Sgt. Elliot stated "Okay, if you are not worried about anything I would say that is fine, let's go ahead and proceed." Nothing in this statement by Sgt. Elliot nor any subsequent statement amounts to an effort to clarify defendant's request. Although, as indicated previously, the state did not see fit to brief the "equivocal request for counsel" issues on appeal, it argued below that defendant's subsequent statement that he was "willing to get it over with" was sufficient to clarify his position and to demonstrate a waiver of his right to counsel.[17] We disagree.

This case is similar to *United States v. Prestigiacomo*, 504 F.Supp. 681 (E.D.N.Y. 1981) (mem.), and *State v. Moulds*, 105 Idaho 880, 673 P.2d 1074 (Ct.App.1983), which were favorably cited by this court in *Griffin*. In *Prestigiacomo*, the interrogator did not clarify the defendant's equivocal request for counsel. 504 F.Supp. at 682. Instead, he asked defendant whether he would continue to answer questions. *Id.* After receiving an affirmative response, he proceeded to interrogate him. *Id.* The court in that case found the interrogator had given "the impression that what defendant said would not be treated as a sign, albeit an equivocal one, that he wished a lawyer." *Id.* at 684. That tactic was improper and, consequently, the court suppressed the statements which resulted from further interrogation. *Id.*

In *Moulds*, the defendant made an equivocal request for counsel. 673 P.2d at 1083. Instead of clarifying the request, the interrogator recognized defendant's right, informed defendant that the decision was his to make, and then proceeded to discuss the case with defendant. *Id.* Thereafter, the defendant made incriminating remarks. *Id.* The Idaho court found that defendant's "statements were the products of interrogation continued at the instance of the police after the right to counsel had been invoked." *Id.*, 673 P.2d at 1085. Consequently, the court affirmed the suppression of the statements. *Id.*

17. The state also argued below that defendant's signing the written waiver form, on the heels of his "willing to get it over with" comment, clarified that his position was to waive his right to counsel. At least one court has accepted this argument. *See State v. Smith*, 34 Wash.App. 405, 661 P.2d 1001, 1003 (1983). In *Smith*, the defendant signed a waiver form subsequent to his equivocal reference to counsel and then proceeded to speak with the officers. Our Washington counterpart found those facts sufficient to demonstrate a waiver on the part of the defendant.

We decline to adopt the Washington position for three reasons. First, we find the position inconsistent with the presumption against waiver. *See State v. Fulton*, 742 P.2d 1208, 1211 (Utah 1987). Second, we have already noted that once a defendant invokes his right to counsel, statements made in subsequent interrogations, without counsel present and even if pursuant to renewed warnings, must also be suppressed unless defendant initiates the contact. *See* note 14, *supra*. If police cannot circumvent the rule through renewed *Miranda* warnings days after a request for counsel, we see no reason to allow them to do so through a simple waiver form given on the heels of the equivocal reference without any clarification. Finally, other courts have not found a waiver where the defendant has signed a waiver form immediately after an unclarified, equivocal reference to counsel. *See, e.g., United States v. Prestigiacomo*, 504 F.Supp. 681, 682–84 (E.D.N.Y.1981) (mem.). *Cf. United States v. Fouche*, 776 F.2d 1398, 1405 (9th Cir.1985) ("[T]he police may not use a statement a suspect makes after an equivocal request for counsel, but before the request is clarified, as an effective waiver of the right to counsel."). Especially in this case, that approach makes sense. Once defendant made an equivocal reference to counsel, as explained in the text Sgt. Elliot could properly do only *one thing*—seek clarification. Instead, he concluded that defendant was "not worried," that they should "proceed ... and get it over with....." and he submitted the written form to defendant for signature. In effect, submission of the written form to defendant was an integral part of Sgt. Elliot's conduct which was at odds with his duty to clarify and as such, the written form cannot be taken as clarifying defendant's equivocal request.

The fatal flaw in both *Prestigiacomo* and *Moulds* was the failure to cease interrogation except for the very limited purpose of clarifying whether defendant wished to assert his right to counsel. The fact that defendant continued to answer questions was not a sufficient indication that he was abandoning his right to counsel. In contrast, *Griffin* serves as an example of a valid waiver of *Miranda* rights following clarification of an ambiguous reference to counsel. In *Griffin*, defendant was advised of his *Miranda* rights, which he waived. 754 P.2d at 966. However, during the ensuing interview there came a time when he said, "I'm calling an attorney." *Id.* The interrogating officer immediately asked, "OK, are you saying you don't want to talk anymore?" [18] *Id.* at 966–67. Defendant's response indicated he would continue to talk to the detective at that time, but planned to talk to an attorney later. *Id.* at 967. Thus, although the conviction in *Griffin* was reversed on other grounds, further interrogation following the clarifying exchange just described was held not violative of defendant's *Miranda* rights.

Defendant's statement in this case included a reference to an attorney which is properly classed as an equivocal request for counsel. Because Sgt. Elliot's warnings were the only *Miranda* warnings which defendant received before undergoing custodial interrogation, it was necessary that someone clarify that equivocal request before defendant could be subjected to custodial interrogation. Defendant's request was never clarified and, consequently, the state failed to demonstrate a valid waiver of defendant's right to counsel. The trial court erred in holding to the contrary. We accordingly reverse and remand for a new trial.

Because the trial court concluded that defendant's *Miranda* rights had not been violated, the parties did not have occasion to argue which evidence had to be excluded and whether any exceptions to the exclusionary rule might apply.[19] On remand,

18. The main problem inherent in the clarification approach is "the additional opportunity given to law enforcement officials to ... [use] clarifying questions to dissuade" suspects from asserting their right to counsel. The Notre Dame Note at 472. *See Anderson v. Smith*, 751 F.2d 96, 104 n. 9 (2nd Cir.1984); *Daniel v. State*, 644 P.2d 172, 177 (Wyo.1982) (permissible for officer to "seek clarification of the suspect's desires, as long as he does not disguise the clarification as a subterfuge for coercion or intimidation"). *See also Thompson v. Wainwright*, 601 F.2d 768, 771–72 (5th Cir.1979) (during purported effort to clarify, officer asserted that obtaining counsel may not be in defendant's best interest); *Hampel v. State*, 706 P.2d 1173, 1182 (Alaska Ct.App.1985) (during purported effort to clarify, officer emphasized delay and complexity of obtaining an attorney).

One commentator has suggested that only one question should be permitted to seek clarification. With our embellishment in the form of an introductory statement, that question is as follows: You have been advised of your rights, including the right to have an attorney with you during this interview even if you cannot afford to hire one. What you just said leads me to wonder whether or not you wish to avail yourself of that right. "Do you want the assistance of [an attorney] at this time or do you agree to answer questions without the presence of [an attorney]?" Comment, *Equivocal Requests for Counsel: A Balance of Competing Policy Considerations*, 55 Cinc.L.Rev. 767, 782 (1987).

19. The "independent source doctrine" and "inevitable discovery rule" are among the exceptions to the exclusionary rule. *See State v. Northrup*, 756 P.2d 1288, 1292–94 (Utah Ct.App.1988). The state had no occasion to argue either exception, on appeal or below. Consequently, we are unable to determine whether either of these exceptions might apply in this case to some of the evidence which might otherwise have to be suppressed.

"The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation." *Nix v. Williams*, 467 U.S. 431, 443, 104 S.Ct. 2501, 2508, 81 L.Ed.2d 377 (1984). Thus, any evidence which was discovered apart from defendant's statements made during custodial interrogation need not be excluded.

The inevitable discovery rule allows the admission of evidence as long as "the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means." *Id.* at 444, 104 S.Ct. at 2509. *See, e.g., People v. Freeman*, 739 P.2d 856, 860 (Colo.Ct.App.1987) (body of deceased victim was so conspicuously located that discovery was inevitable); *State v. Miller*, 300 Or. 203, 709 P.2d 225, 242–43 (1985) (hotel maid would inevitably have discovered body of deceased victim within 56 hours of actual discovery and reported discovery to police), *cert. denied*, 475 U.S. 1141, 106 S.Ct. 1793, 90 L.Ed.2d 339 (1986). Under this rule, the prosecution must show that the evidence "would" have been discovered, not

the parties must of course be allowed to argue these various points. After entertaining these arguments, the trial court must exclude all primary evidence elicited during the custodial interrogation and all incriminating evidence derived therefrom which is not saved by an exception to the exclusionary rule. *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S.Ct. 1602, 1630, 16 L.Ed.2d 694 (1966); *Nix v. Williams*, 467 U.S. 431, 441, 104 S.Ct. 2501, 2507, 81 L.Ed.2d 377 (1984).

Our decision is a difficult one and will be a source of consternation to many, who will question why the state should be put to the cost and burden of having to retry someone who clearly is guilty. But while the results in particular cases may be unwelcome, "[t]he fifth amendment exclusionary rule is clearly dictated by the Constitution and is the only possible means of protecting the values underlying the privilege against self-incrimination." M. Gardner, *The Emerging Good Faith Exception to the Miranda Rule—A Critique*, 35 Hastings L.J. 429, 466 (1984). We accordingly reverse and remand for proceedings consistent with this opinion.

BILLINGS and GREENWOOD, JJ., concur.

ON PETITION FOR REHEARING

"New" Matter

In its first brief and oral argument before this court, the state, as to the range of *Miranda* issues, made a deliberate tactical decision to rely solely on the theory that defendant was not subjected to "custodial interrogation" at the time of the polygraph examination, *supra* at 1108, an issue which has now been resolved in defendant's favor. *See id.* In our initial opinion we regarded this approach by the state as "stop[ping] short of conceding" defendant's arguments concerning his equivocal request for counsel. *Id.* In its petition for rehearing, the state now argues for the first time that defendant's response to subsequent *Miranda* warnings [20] adequately served to clarify defendant's equivocal request for counsel or, perhaps more accurately, obviated any need to clarify the request.

While the state's decision not to develop this issue at trial is understandable in light of the state's success there on the argument that defendant had not even equivocally invoked his right to counsel when first given *Miranda* warnings, *see supra* at 1108, the state should have raised the argument in initial briefing on appeal if it believed this fall-back position had merit. Given the posture of the trial court proceedings, this would not have run afoul of our proscription against raising arguments for the first time on appeal. But in such a situation, consistent with our standing aversion to considering for the first time at some later stage issues that could have been raised at an earlier stage, we ordinarily will not consider arguments presented for the first time on petition for rehearing, and are especially loathe to revisit a decision once rendered when the party seeking reconsideration intentionally did not present us with particular arguments in more timely fashion. *See State v. Marshall*, 791 P.2d 880, 885–87 (Utah Ct.App.), *cert. denied*, 800 P.2d 1105 (Utah 1990).

However, we are not unsympathetic to the sheer volume and complexity of issues presented in this case, some ten having been raised by appellant, even though we found it necessary to reach only two in our initial opinion. *See supra*, at 1103. Even without addressing the issues of whether, assuming custodial interrogation, defendant equivocally invoked his right to counsel and, if he did, whether the subsequent

simply that it "could" or "might" have been discovered. *Miller*, 709 P.2d at 242. *See also United States v. Romero*, 692 F.2d 699, 704 (10th Cir.1982). It is altogether unclear from the record before us how much, if any, of the evidence discovered as a result of the improper custodial interrogation would inevitably have been discovered.

20. In view of the state's prior position, we made only minimal reference to the subsequent warnings in our initial opinion, noting that "the state does not argue the second set of *Miranda* warnings are of any consequence to our analysis." *Supra* at 1108 n. 14.

warnings cured the problem, the state's initial brief ran well over our page limit for briefs.

Considering the state's burden when confronted with multiple issues of the magnitude presented here, in conjunction with the significance of the waiver issue, and in light of helpful authority from the United States Supreme Court which was not available at the time of initial argument, we grant the state's petition for rehearing and proceed to treat its claim that the subsequent *Miranda* warnings and defendant's response thereto served to clarify his prior equivocal request for counsel or at least rendered it inconsequential as to the incriminating statements he made after getting new *Miranda* warnings.[21]

Subsequent Miranda Warnings As Clarifying Equivocal Request

[5] The state concedes for purposes of our further review that Sergeant Elliot erred in failing to follow firmly established precedent by not clarifying defendant's equivocal reference to counsel when defendant was first given the *Miranda* warnings. However, the state argues that a subsequent set of warnings, subsequent waiver by defendant, and information gleaned from the subsequent interrogation purged the taint of illegality introduced by the earlier disregard of defendant's equivocal request for counsel. The state calls our attention to *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), and claims we improperly relied on *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). *See Sampson*, at 1108 n. 14. The state focuses particularly on an ambiguous footnote in *Edwards*. *See* 451 U.S. at 486 n. 9, 101 S.Ct. at 1885 n. 9.

In *Elstad*, the United States Supreme Court held that a defendant's subsequent statement, given after an initial statement made without the benefit of *Miranda* warnings, may be admissible when *Miranda* warnings preceded the subsequent statement and there were no improper or coercive tactics employed by police in connection with the initial statement. *Elstad*, 470 U.S. at 314, 105 S.Ct. at 1296. The Court's rationale was that *Miranda*'s protective measures, not the Fifth Amendment itself, were violated in such a case, making suppression of the later statements unnecessary. *Elstad*, 470 U.S. at 308, 105 S.Ct. at 1292.

On the other hand, in *Edwards* the Court emphasized that, unless an accused initiates the encounter, police cannot re-administer *Miranda* warnings and renew interrogation once a defendant has "clearly asserted" his or her right to counsel on an earlier occasion when *Miranda* warnings were actually given. *Edwards*, 451 U.S. at 484–85, 101 S.Ct. at 1884–85.

The state invites us to focus total attention on the "clearly asserted" language in *Edwards*, and hold that *Edwards* is accordingly inapplicable. The state would have us instead employ the *Elstad* rationale, because defendant did not *clearly* assert his right to counsel in this case, and determine whether the Fifth Amendment itself was violated. In essence, the state asserts we must find that defendant effectively waived his right to counsel when he was given new *Miranda* warnings and said nothing about counsel since the failure to clarify the equivocal request for counsel was "only" a violation of the *Miranda* doctrine, not a violation of the Fifth Amendment.

We recognize that waiver of constitutional rights is "possible ... when the request for counsel is equivocal." *Edwards*, 451 U.S. at 486 n. 9, 101 S.Ct. at 1886 n. 9. But we are hard-pressed to see how an equivocal request for counsel can be meaningfully waived in advance of its having ever been clarified.

"The merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application." *Minnick v. Mis-*

21. We note that these circumstances are unique and hasten to caution that the complexity of issues, the length of briefs, or a tactical choice to initially avoid issues on appeal will normally not suffice to induce us to consider issues raised for the first time on a request to reconsider a decision already made.

sissippi, — U.S. —, 111 S.Ct. 486, 490, 112 L.Ed.2d 489 (1990). A defendant who requests counsel "is not subject to further interrogation by the [police] until counsel has been made available to him...." *Edwards*, 451 U.S. at 485, 101 S.Ct. at 1885. The *Edwards* decision leaves no room for ambiguity or uncertainty in the context of a clear invocation of the right to counsel. The singular event which may occur upon a defendant's request for counsel is for the defendant to consult with counsel.[22] Neither the passage of time, however great, nor the administration of additional *Miranda* warnings will allow officers to begin interrogation anew unless the suspect has been given the chance to consult with an attorney.

Obviously, the instant case does not fit squarely into either the *Elstad* or the *Edwards* framework. Unlike in *Elstad*, *Miranda* warnings were given to Sampson at the outset; unlike in *Edwards*, Sampson's request for counsel was not unequivocal. But we think the equivocal request for counsel situation is conceptually and practically more analogous to a clear request for counsel, as in *Edwards* and *Minnick*, than it is to a wholly unwarned statement as in *Elstad*. By analogy to the point made in the preceding paragraph regarding a clear request for counsel, it would appear that the singular event which may occur upon a defendant's equivocal reference to counsel is for defendant's "request" to be clarified. *See supra*, at 1110 n. 17 ("Once defendant made an equivocal reference to counsel ... Sgt. Elliot could properly do only *one thing*—seek clarification."). Neither the passage of time, however great, nor the administration of additional *Miranda* warnings will allow officers to reconvene interrogation absent clarification. If a signed waiver executed immediately after the equivocal request for counsel will not be taken as adequate clarification, *see id.*, 1110, there is no reason why a waiver later in time should be recognized as such. Simply put, we believe that an equivocal request for counsel must be treated by the police and analyzed by the courts as though it were an unambiguous request for counsel—until such time as it has been properly clarified and shown to be otherwise.[23]

Violation Of Miranda vs. Violation Of Fifth Amendment

[6] The state urges that the subsequent confession and derivative evidence were properly admitted under *Elstad*, claiming the failure to clarify defendant's equivocal request for counsel, although a violation of *Miranda*, was not violative of the Fifth Amendment itself. In advancing its *Elstad* argument, the state principally relies on *Martin v. Wainwright*, 770 F.2d 918 (11th Cir.1985), *cert. denied*, 479 U.S. 909, 107 S.Ct. 307, 93 L.Ed.2d 281 (1986).[24] In *Mar-*

22. The *Edwards* Court did not foreclose the possibility of waiver of the right to counsel when a defendant, once having invoked the right, freely initiates further conversation with officers even though the defendant has not consulted counsel. *See* 451 U.S. at 484–85, 101 S.Ct. at 1884–85. *See also United States v. De La Luz Gallegos*, 738 F.2d 378, 381 (10th Cir.) (where attorney is requested but not yet provided, *Edwards* does not preclude introduction of voluntary statements not made as a result of police questioning), *cert. denied*, 469 U.S. 1076, 105 S.Ct. 574, 83 L.Ed.2d 514 (1984).

23. The concern which explains our view is, in large part, this: In the course of properly clarifying an equivocal request, the sanctity of an accused's right to counsel will be brought home for the accused. *See supra* at 1110. If instead an equivocal request is ignored, and the timid or ignorant suspect's halting effort to explore the advisability of seeking counsel is apparently for naught, the suspect may perceive he is being discouraged from availing himself of the right to counsel. Someone in defendant's shoes who simply gets a new set of *Miranda* warnings with no acknowledgement of his prior reference to counsel may think: "I wondered before if I should have a lawyer. My question was ignored. There's no sense in raising it again."

24. The state has cited other cases to similar effect in its petition and at oral argument. *E.g.*, *United States v. Gonzalez–Sandoval*, 894 F.2d 1043 (9th Cir.1990); *United States v. Barte*, 868 F.2d 773 (5th Cir.), *cert. denied*, — U.S. —, 110 S.Ct. 547, 107 L.Ed.2d 543 (1989); *Elledge v. Dugger*, 823 F.2d 1439 (11th Cir.1987); *United States v. Patterson*, 812 F.2d 1188 (9th Cir.1987), *cert. denied*, 485 U.S. 922, 108 S.Ct. 1093, 99 L.Ed.2d 255 (1988); *Thompson v. Wainwright*, 601 F.2d 768 (5th Cir.1979); *United States ex rel. Hudson v. Cannon*, 529 F.2d 890 (7th Cir.1976). Even if they were otherwise persuasive, the

tin, the suspect was given his *Miranda* warnings. In the course of interrogation, he asked: "Can't we wait until tomorrow?" *Martin*, 770 F.2d at 922–23. The Eleventh Circuit held this question was an equivocal request to *terminate questioning and to invoke the right to remain silent*, at least temporarily. It is notable that the court did not find the question to be an equivocal request for counsel, although it determined that an equivocal request to terminate questioning should be treated analogously to an equivocal request for counsel. *Martin*, 770 F.2d at 924.

The court held that the defendant's first confession, given subsequent to his equivocal request to remain silent which was not honored, was inadmissible as violative of *Miranda*. *Martin*, 770 F.2d at 924. The court stated that the failure to terminate questioning pending clarification, like the failure to give *Miranda* warnings in the *Elstad* context, violates the technical requirements of the *Miranda* rule although it does not violate the Fifth Amendment. *Id.* at 928–29. But because the first confession was not coerced, the court upheld admission of a second confession, given several days later and on the heels of renewed *Miranda* warnings, and after the defendant had consulted with counsel. *Id.* at 929.

The state asks us to treat the failure to clarify defendant's equivocal request for counsel in this case in similar fashion to *Martin* and to determine that it was merely a technical violation of the *Miranda* rule, and therefore does not bar introduction of defendant's subsequent confession made after new *Miranda* warnings were given. In urging this analogy, the state slights the continued vitality and invigoration given *Edwards v. Arizona* in subsequent Supreme Court decisions, including the recent decisions in *Minnick v. Mississippi*, — U.S. —, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990) and *Arizona v. Roberson*, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988). Moreover, such an analysis is inapposite given our determination that an equivocal reference to counsel should be, until properly clarified, treated on equal footing with an unambiguous request to speak to an attorney.[25]

A rigid insistence on clarification of the equivocal request for counsel if interrogation is to continue requires just that—clarification. *State v. Griffin*, 754 P.2d 965, 969 (Utah Ct.App.1988). An equivocal request is simply not clarified by being ignored by the police. Clarification necessarily implies that the equivocal request must be acknowledged by the interrogator. The interrogator must ask something like: "Your response suggests that you may

cases cited by the state are readily distinguishable in that no case involves two sets of *Miranda* warnings—the first followed by an equivocal request for counsel and the second followed by apparent waiver—as is the case before us. The cases, with the exception of *Martin* which we treat more fully in the text, instead involve some variation on the *Elstad* theme—statements made without *Miranda* warnings, followed by *Miranda* warnings, waiver, and further statements.

The state additionally cites, in a letter submitted after argument on the petition for rehearing, *State v. Christofferson*, 793 P.2d 944 (Utah Ct.App.1990), claiming that this court there "held that [a] second set [of warnings] served as a clarification of the equivocal request." We do not read *Christofferson* this way. The police officers in *Christofferson* apparently ceased questioning after the equivocal request for counsel, and proceeded to clarify the defendant's equivocal request. Once they did so and learned that the defendant did not desire counsel, the officers continued interrogation. *Id.* at 947. We hesitate to read the decision as equating a mere second administration of *Miranda* warnings, even if no *Miranda* rights were then invoked, with definitive clarification of an equivocal request for counsel. Such an important and far-reaching conclusion would surely have been accompanied by lengthy discussion and analysis, which is not to be found in the opinion, and is at odds with language in the opinion noting that clarifying questions were asked prior to proceeding with a second set of warnings and further interrogation. *See id.*

25. The state's proffered analysis is further flawed in that the bright-line rule of *Edwards*, cited in *Minnick v. Mississippi* for "clarity of its command" and "certainty of its application," 111 S.Ct. at 490, would be undermined if courts were required to receive evidence pertaining to the lack of coercion attending an equivocal request for counsel. In addition to breeding contempt for a cherished constitutional right, significant judicial resources would be needlessly expended, a result clearly eschewed in *Edwards* and its progeny.

wish to consult with an attorney before answering any of my questions. Do you wish to speak with an attorney or do you wish to answer my questions now?" *Sampson*, at 1109.

For all practical purposes, as we have held above, until such time as the equivocal reference to counsel is clarified as not being an actual request for counsel, it must be treated the same as an express and unambiguous request for counsel. *Cf. Griffin*, 754 P.2d at 969. ("[W]hen an accused makes an arguably equivocal request for counsel during custodial interrogation, further questioning must be limited to clarifying the request.") The question then becomes whether the Constitution, or only *Miranda*, is violated if police disregard an invocation of the right to counsel and obtain a confession.

The answer is clear. *Edwards* and its progeny teach that once the right to counsel has been invoked "subsequent incriminating statements made without [the defendant's] attorney present [violate] the rights secured to the defendant by the *Fifth and Fourteenth Amendments to the United States Constitution.*" [26] *Oregon v. Bradshaw*, 462 U.S. 1039, 1043, 103 S.Ct. 2830, 2833, 77 L.Ed.2d 405 (1983) (emphasis added); *See Shea v. Louisiana*, 470 U.S. 51, 52, 105 S.Ct. 1065, 1066, 84 L.Ed.2d 38 (1985) (interrogation subsequent to a request for counsel violates Fifth and Fourteenth Amendments). *See also Minnick*, 111 S.Ct. at 489 (valid waiver cannot be established by showing that defendant responded to further questions).

In *Roberson*, the Court stated: "Surely there is nothing ambiguous about the requirement that after a person in custody has expressed his desire [for] counsel, he 'is not subject to further interrogation ... until counsel has been made available to him....'" 486 U.S. at 682, 108 S.Ct. at 2098 (quoting *Edwards*, 451 U.S. at 484–85, 101 S.Ct. at 1885). Given our view that an equivocal request must be treated like a clear request pending clarification, failure to clarify an equivocal request, and interrogation conducted after that request, clearly do not fall within the rubric of a "mere technical violation" as suggested by the state.

The United States Supreme Court has demonstrated no crypticism or ambivalence in holding violations of the right to counsel during interrogation to be constitutional in nature. *See Minnick*, 111 S.Ct. at 491 ("Whatever the ambiguities of our earlier cases on this point, we now hold that when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present...."); *Roberson*, 486 U.S. at 683, 108 S.Ct. at 2098–99 (emphasizing distinction between exercise of right to terminate interrogation and remain silent and right to counsel).

We therefore decline to adopt a rule which would relegate failure to clarify an equivocal request for counsel to the status of "mere" *Miranda* violation for *Elstad* purposes.[27]

26. Insofar as *Martin's* view of an analogy between an equivocal invocation of the right to remain silent and an equivocal request for counsel might suggest otherwise, we reject that view. *Cf. Roberson*, 486 U.S. at 683, 108 S.Ct. at 2099 (emphasizing distinction between exercise of right to terminate interrogation and remain silent and right to counsel).

27. The state also argues that even if defendant's statements must be suppressed, the derivative physical evidence, chiefly the victim's body, would be properly admitted, presumably by way of photographs and descriptive testimony. The state proceeds upon the assumption that the interrogation subsequent to defendant's equivocal reference to counsel, concededly a violation of the *Miranda* rule, was merely technically defective, not constitutionally infirm. The state calls our attention to several decisions in which other courts have allowed the admission of derivative evidence obtained subsequent to interrogation conducted in violation of the technical rules of *Miranda*. *See, e.g., United States v. Patterson*, 812 F.2d 1188 (9th Cir.1987), *cert. denied*, 485 U.S. 922, 108 S.Ct. 1093, 99 L.Ed.2d 255 (1988); *In re Owen F.*, 70 Md.App. 678, 523 A.2d 627, *cert. denied*, 310 Md. 275, 528 A.2d 1286 (1987); *State v. Wethered*, 110 Wash.2d 466, 755 P.2d 797 (1988). We find the cases cited by the state to be inapplicable, as each addresses violations of the *Miranda* rule which are not deemed constitutional in dimension. We have already held in evaluating the state's *Elstad* argument that the violation of defendant's right to counsel was of constitutional dimension and not merely a violation of *Miranda*.

CONCLUSION

The subsequent *Miranda* warnings given to defendant did not serve to clarify his prior equivocal request for counsel or somehow make that request go away. The violation was constitutional in magnitude. Accordingly, testimonial and physical evidence derived from all ensuing interrogation must be suppressed.

Having reheard and reconsidered the matter, our initial opinion stands as supplemented herein.

GATE CITY FEDERAL SAVINGS AND LOAN ASSOCIATION, Plaintiff and Appellant,

v.

Edward A. DALTON, Jr., John C. Forrester, Jr., Michael C. Johnson, and Daniel W. Marcum, et al., Defendants and Appellees.

No. 890498-CA.

Court of Appeals of Utah.

March 26, 1991.

Lender brought action against borrowers following default on trust deeds and notes. The District Court, Summit County, J. Dennis Frederick, J., entered summary judgment in favor of borrowers, and lender appealed. The Court of Appeals, Garff, J., held that: (1) under trust deed provision setting forth requirements to release borrowers from their obligations on note, indemnity agreement executed by lender satisfied requirements that written assumption be executed by borrowers' successor in interest and be accepted in writing by lender, and (2) lender waived its option to accelerate borrowers' obligations under trust deeds and note by consenting to borrowers' transfer of property in indemnity agreement, in which it acknowledged assumption of mortgages.

Affirmed.

1. Appeal and Error ⇐934(1)

In determining whether lower court correctly found that there was no genuine issue of material fact in ruling on summary judgment motion, Court of Appeals views facts and inferences to be drawn therefrom in light most favorable to losing party. Rules Civ.Proc., Rule 56(c).

2. Appeal and Error ⇐842(1)

Court of Appeals reviews trial court's decision on legal questions for correctness.

3. Indemnity ⇐9(1)

Under trust deed provision setting forth requirements for release of borrowers from their obligations on note, indemnity agreement executed by lender satisfied requirements that written assumption be executed by borrowers' successor in interest and be accepted in writing by lender; under indemnity agreement, borrowers' successor in interest agreed not only to indemnify lender for any mechanics liens on property, but also to assume individual mortgages.

Evidence obtained in violation of the Fifth Amendment is properly suppressed under the fruit of the poisonous tree doctrine. *Supra* at 1111. *See, e.g., Shea v. Louisiana*, 470 U.S. 51, 52, 105 S.Ct. 1065, 1066, 84 L.Ed.2d 38 (1985) (interrogation subsequent to request for counsel violates Fifth Amendment). *See also Nix v. Williams*, 467 U.S. 431, 442 & n. 3, 104 S.Ct. 2501, 2508 & n. 3, 81 L.Ed.2d 377 (1984). While we are not ignorant of the obstacles which the state will face in presenting a case on remand without evidence of the body absent the applicability of some exception to the exclusionary rule, *see supra* at 1111 & n. 19, the derivative evidence of the child's body was obtained as a direct result of interrogation that was improper as a matter of constitutional law, and must, absent some exception, be suppressed. We are not enthusiastic about the obstacles our decision will create to securing defendant's conviction on retrial. But we are unwilling to sidestep important constitutional safeguards to assuage the frustrations that inhere in retrying a defendant clearly guilty of such a heinous crime. *See Nix v. Williams*, 467 U.S. at 442, 104 S.Ct. at 2508.

APPENDIX B

IN THE SUPREME COURT

STATE OF UTAH

332 STATE CAPITOL

SALT LAKE CITY, UTAH 84114

August 23, 1991

OFFICE OF THE CLERK

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State of Utah,
Plaintiff and Petitioner,
v.
Carlos R. Sampson,
Defendant and Respondent.

No. 910234
890327-CA
CR87497

This day Petition for Writ of Certiorari having been heretofore considered, and the Court being sufficiently advised in the premises, it is ordered that the same be, and hereby is, denied.